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No. 97-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

PRO-FOOTBALL, INC. d/b/a
THE WASHINGTON REDSKINS,

*Petitioner,*

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR A WRIT OF CERTIORARI

BARRY WM. LEVINE
MARK A. PACKMAN
*Counsel of Record*
JASON D. WALLACH
DICKSTEIN SHAPIRO MORIN &
OSHINSKY LLP
2101 L Street, NW
Washington, DC 20037-1526
(202) 785-9700

*Counsel for Petitioner*

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

88 pp

## QUESTIONS PRESENTED

1. Whether the Court of Appeals, which ordered summary judgment for the Respondent-insurer on the issue of whether it could retroactively charge workers' compensation insurance premiums at District of Columbia premium rates (rather than the agreed-upon Virginia rates, which are lower), erroneously failed to place the appropriate burden under Fed. R. Civ. P. 56 on the insurer to show that its construction of the insurance policy at issue was the only reasonable construction of that policy.

2. Whether the dismissal of Petitioner's compulsory counterclaims as time-barred is inconsistent with the policies underlying the Federal Rules of Civil Procedure, where the counterclaims were filed within the time limits specified in Fed. R. Civ. P. 12.

## LIST OF ALL PARTIES BELOW

The parties to this proceeding in the court below were Pro-Football, Inc. d/b/a The Washington Redskins and The Hartford Accident and Indemnity Company.

## LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Pursuant to S. Ct. R. 29.6, Pro-Football, Inc. states that it has no subsidiaries and that its sole parent is Jack Kent Cooke Incorporated.

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## OPINIONS BELOW

The Court of Appeals' opinion is reported at 127 F.3d 1111 (D.C. Cir. 1997), and is reproduced at Appendix ("App.") 1-23. The District Court's opinion, App. 25-43, is unreported. The Court of Appeals' denials of Petitioner's petition for rehearing and suggestion for rehearing *en banc,* App. 44, 45, are unreported.

## JURISDICTION

The Court of Appeals issued its opinion on October 28, 1997, and denied Petitioner's petition for rehearing and suggestion for rehearing *en banc* on December 10, 1997. This Petition is being filed within 90 days of the denial of the petition for rehearing, as required by S. Ct. R. 13.1 and 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This Petition is not a cross-petition, and Petitioner does not rely on S. Ct. R. 12.5.

## STATUTORY PROVISIONS INVOLVED

This Petition involves Fed. R. Civ. P. 12(a)(1)(A), 12(a)(4)(A), 13(a), 56(a), and 56(c), which are set forth at App. 46-48.

## STATEMENT OF THE CASE

### I. THE INSURANCE POLICY

Respondent The Hartford Accident and Indemnity Company ("Hartford") provided three one-year workers' compensation insurance policies between July 1988 and July 1991 (collectively the "Policy") to Petitioner Pro-Football, Inc. ("PFI"), a corporation headquartered in Virginia that owns and operates the Washington Redskins. App. 25-26. Like all insurance contracts, the Policy shifted the risk of loss to the insurer in return for a premium. Under the Policy, Hartford agreed to pay workers'

compensation benefits for injured employees of PFI, including Redskin players. As Hartford well knew, because the Redskins play football games in the District of Columbia, players could incur injuries there and assert claims for District of Columbia workers' compensation benefits. *See* App. 2 ("[The District of Columbia] allow[s] recovery [of benefits] by an employee who is injured within [its] borders.").

Hartford nonetheless agreed to charge Virginia premium rates, which were substantially lower than District of Columbia rates, to cover Redskin players. App. 27.[1] This agreement reflected the fact that Redskin players spent the vast majority of their working hours in Virginia. App. 26.[2] The agreement was highly significant, because (as Hartford knew) benefits are higher in the District of Columbia than in Virginia. App. 28.

Workers' compensation insurance premiums vary depending on the types of work performed by the policyholder's employees (which are referred to as "classifications"). App. 27. Not surprisingly, premiums are higher for job classifications involving a greater risk of injury. *See id.* n.4. The Policy grouped PFI's employees

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[1]As the parties stipulated in the District Court, premium rates are set by state insurance regulators and vary from state to state. Joint Stipulations of Fact ("J.S.") ¶¶ 50-51.

[2]During the regular season Redskin players practiced and trained five days a week at Redskin Park in Herndon, Virginia. J.S. ¶ 3. They predominantly signed their employment contracts in either Carlisle, Pennsylvania (where the Redskins held a pre-season training camp) or Virginia, and they received paychecks issued in Virginia. Affidavit of Stuart A. Haney in support of Pro-Football's Motion for Summary Judgment ("Haney Aff.") ¶ 4. By contrast, Redskin players worked in the District of Columbia on only eight Sunday afternoons during the regular football season and on no more than four other dates for pre-season and post-season games. J.S. ¶¶ 2, 4; Haney Aff. ¶ 5.

into three classifications: (1) contact sports (*i.e.*, football players); (2) operations and drivers; and (3) clerical employees. App. 27. The Policy's "Classifications Clause" stated, "These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy." App. 20.

PFI's premiums also depended on the size of its payroll; the larger the payroll, the larger the premium. Under the Policy, the "[p]remium for each work classification is determined by multiplying a rate times a premium basis [*i.e.*, the payroll and all other remuneration (App. 34)]." App. 20.

Premiums could be adjusted retroactively under certain limited circumstances, which were spelled out in the Policy's "Final Premium Clause":

> The Premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classification and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance.

App. 20-21. The "Audit Clause" of the Policy gave Hartford the right to audit PFI's books and records to develop information for determining the final premium. App. 21. The Policy's terms, however, could "not be changed . . . except by endorsement." App. 20. Thus, if

the "actual . . . premium basis" differed from the "estimated" premium basis and/or the parties had failed to assign "proper classification[s] and rates," the premium could be adjusted retroactively by endorsement.

Premiums could also be changed *prospectively* if the policyholder experienced higher-than-expected losses. App. 28. In such cases, the premium would be multiplied by an "experience modification factor" (also known as a "mod" or "mod factor"). App. 5. Hartford utilized the mod to increase PFI's premiums during the three years the Policy was in effect, App. 28, and (as Hartford recognized in its opening brief in the Court of Appeals) by 1991 the mod was "quite high," Brief for The Hartford Accident and Indemnity Company ("Hartford Br.") at 12.

PFI has paid Hartford approximately $1.7 million in premiums under the Policy. Hartford, however, has paid out only approximately $1.4 million in benefits. J.S. ¶¶ 77, 78.[3]

## II. THE *ANDERSON* DECISION

Before Hartford ever insured PFI, injured Redskin players had filed for workers' compensation benefits in the District of Columbia, seeking the higher benefits paid by the District. App. 28. This fact was well-known to Hartford prior to its issuance of the Policy and its agreement to charge Virginia premium rates. Like PFI's prior workers' compensation insurer, Hartford defended PFI against claims for District of Columbia benefits. *Id.*[4]

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[3]Hartford has reserved approximately $600,000 for potential payments of benefits that may arise from the three policy years. J.S. ¶ 79. This reserve is known as the "tail."

[4]PFI, having shifted the risk of loss to Hartford, relied on Hartford to defend these claims; PFI was the nominal party and was passive in the litigation.

Moreover, Hartford typically settled such claims with the approval of the District of Columbia Department of Employment Services ("DOES"). Affidavit of Stuart A. Haney in support of Pro-Football's Motion for Summary Judgment ("Haney Aff.") ¶ 16.

In 1989, however, in a case known as *Anderson*, the Director of DOES held certain Redskin players eligible for District of Columbia workers' compensation *benefits*, even though they had not been injured there. *Id.* If, as Hartford *now* claims, it truly believed this ruling obligated it to charge District of Columbia *premiums* for coverage of Redskin players, Hartford could have informed PFI on July 10, 1989, the date of the Director's decision, of its intention to charge District of Columbia premium rates for the upcoming policy year beginning on July 14, 1989, and all subsequent policy years unless and until the decision was reversed. Alternatively, Hartford could have informed PFI that it would continue to charge Virginia premiums pending appeal to the District of Columbia Court of Appeals, but that if the court affirmed, then Hartford would have to increase PFI's premiums retroactively to District of Columbia rates. Hartford took neither of these actions. Instead, in an apparent effort to keep PFI's business for the 1989-90 and 1990-91 policy years, Hartford "continued to agree to classify Redskins players and coaches as Virginia employees," App. 35 n.8, renewing the Policy in July 1989 and again in July 1990 at Virginia premium rates. *See* J.S. ¶ 71. Hartford never suggested (prior to April 1991) that the premiums were contingent upon the outcome of *Anderson*, nor did it ever intimate that it would rely upon an adverse decision in *Anderson* to assess District of Columbia premiums retroactively. J.S. ¶ 68.

On PFI's behalf, Hartford appealed *Anderson* to the District of Columbia Court of Appeals. In March 1991, however, that court upheld the Director's finding because it was not "plainly wrong." *Pro-Football, Inc. v. District of Columbia Dep't of Employment Servs.*, 588 A.2d 275, 279 (D.C. 1991). In so holding, the court recognized it had to apply a highly deferential standard of review, "even if another construction may be just as reasonable as the agency's, and even if we might have reached a different conclusion had the initial decision been ours to make." *Id.*[5] Neither the Director of DOES nor the *Anderson* court said anything, however, about whether the players were District of Columbia employees for purposes of determining *premiums*, because the issue of premiums was never litigated in *Anderson*.[6] As Hartford concedes, "no issue was or could have been presented in [*Anderson*] relating to the premium calculation for the Redskins workers' compensation insurance policies." Hartford Br. at 16.

## III. THE RETROACTIVE PREMIUM INCREASE AND THE TOLLING AGREEMENT

Nonetheless, on April 17, 1991, after the 1990-91 football season had ended and the primary exposure of football players to injury had ceased, Hartford notified PFI

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[5]Indeed, another court held Redskin players to be Virginia employees. *National Football League Players Ass'n v. Pro-Football, Inc.*, 857 F. Supp. 71, 79, 80 (D.D.C. 1994), *appeal dismissed as moot*, 79 F.3d 1215 (D.C. Cir. 1996).

[6]Had *Anderson* been a premiums dispute, football players would not have been parties. The players' interest was in the benefits, not the premiums. A dispute regarding premiums -- if there were to be one -- would have been between Hartford and PFI. *Anderson* was not such a case.

that the *Anderson* decision *obligated* Hartford to charge District of Columbia premiums retroactively. J.S. ¶ 73. In other words, after losing the *Anderson* case on PFI's behalf, Hartford sought to profit from the loss at the expense of its insured.

Applying District of Columbia premium rates, Hartford billed PFI almost $8 million in additional premiums. J.S. ¶¶ 75, 77. PFI refused to pay, and, following negotiations, Hartford agreed its computation was erroneous and lowered its demand to approximately $5.3 million, which was still more than three times the $1.7 million PFI had already paid in premiums and almost four times the $1.4 million players had received in benefits. *Id.* ¶¶ 77-78. PFI refused to pay the revised demand and the parties continued to negotiate. To facilitate the negotiations, the parties entered into an agreement that protected both of them by extending the statute of limitations until October 22, 1994, for "an[y] action in connection with the unpaid premiums." App. 39.

## IV. THE COMPLAINT

Even though PFI continued to negotiate in good faith, Hartford brought a diversity action on Thursday, October 20, 1994 -- two days before the statute of limitations expired. Thus, unless the filing of the complaint tolled the statute of limitations, PFI had less than two days to receive service of the complaint, retain counsel, answer, and counterclaim. In its complaint, Hartford admitted it had "acquiesced in PFI's request to initially classify all non-clerical personnel as Virginia employees," but also alleged that *Anderson* "obligated" it to charge premiums at District of Columbia rates. Complaint ¶¶ 15, 16. Claiming PFI had breached the Policy by refusing to pay the additional premiums,

Hartford pleaded three counts of breach of contract, one for each policy year, and sought $5.3 million in additional premiums as damages.

## V. THE COUNTERCLAIMS

PFI timely moved to dismiss. The District Court denied the motion and, within the time limits specified in the Federal Rules of Civil Procedure, PFI answered and counterclaimed for breach of contract, fraud, negligent misrepresentation, breach of fiduciary duty, and bad faith. PFI alleged, ***inter alia***, that Hartford had a conflict of interest. On the one hand, Hartford represented PFI in ***Anderson*** and had a duty to defend PFI's interests in that litigation. At the same time, however, Hartford failed to disclose that, if it lost ***Anderson***, it would use that loss against PFI by retroactively charging District of Columbia premiums; indeed, Hartford had an economic incentive to lose ***Anderson***, because it stood to make more money if District of Columbia premium rates applied, since its compensation was linked to the rates charged.

## VI. THE DISTRICT COURT'S RULING

Hartford moved to dismiss the counterclaims, and both parties moved for summary judgment on Hartford's complaint. The District Court granted Hartford's motion to dismiss the counterclaims, denied Hartford's motion for partial summary judgment, and granted PFI's motion for summary judgment. App. 25.

### A. The Grant Of Summary Judgment

Addressing first the cross-motions for summary judgment, the District Court observed that Hartford had "agreed at the outset that classification of the players as Virginia employees was appropriate." App. 37. The District Court held that Hartford could not "effect a

change in the policy's terms and charge additional premiums for the 1988 and 1989 policy years" because the Policy "unequivocally states" that its terms "can only be changed through endorsement" and Hartford "unquestionably ~~only~~ issued an endorsement . . . for the 1990-91 policy." App. 33.

The court went on to hold that, even if Hartford had issued an endorsement, summary judgment for PFI would still be appropriate because "the policy does not authorize Hartford to change the jurisdictional basis of the policy" retroactively. App. 34. The court reasoned that

> changes to the "business or work" classifications may be made through endorsement to the policy if the classifications in the policy do not properly describe an employer's "actual exposures." For example, if employees classified as office personnel in fact performed construction work, Hartford could reclassify those employees and assess the corresponding rates and premium basis by endorsement to the policy. It is evident, however, that the Classifications clause goes to the work classifications of the insured's employees, and not the jurisdictional basis of the rates assigned to those classifications. Had the parties intended the clause to include *geographic* classifications as well as "business or work" classifications, presumably they would have included such language in an endorsement to the policy.

*Id.* (footnote omitted).

The court further reasoned that "final premium equals final classifications and rates, as determined under

the Classification clause (which require an endorsement to change) multiplied by the actual premium basis [*i.e.*, the Redskins' actual payroll and all other remuneration], as determined under the Audit clause." App. 35. The District Court rejected Hartford's argument that the Final Premium Clause authorized it to apply District of Columbia rates. *Id.* As the District Court noted, "such an interpretation conflicts with the express policy provisions setting forth the basis for calculating final premiums . . . as well as the general provision requiring changes in the terms of the policy to be made through an endorsement." *Id.*

The court likewise rejected Hartford's argument that *Anderson* required Hartford to charge District of Columbia premium rates, stating, "Hartford's position would require interpreting the policy to authorize that which its plain language does not." App. 33. As the court held, nothing in *Anderson*

> mandated Hartford to retroactively switch the jurisdictional basis of its policies. *Anderson* held that Redskins players who play at RFK Memorial Stadium may collect D.C. workers compensation benefits if they are injured in the course of employment. . . . But the decision cannot be read as mandating a retroactive change in the jurisdiction of the premiums, particularly in light of the absence of an express provision in the contract addressing such a potential change.

App. 35-36.

B. The Dismissal Of The Counterclaims

The District Court granted Hartford's motion to dismiss PFI's counterclaims, deeming them barred by the District of Columbia's three-year statute of limitations on

tort and contract claims. App. 38. In the court's view, PFI's counterclaims accrued no later than the spring of 1991, after Hartford "notified [PFI] that it was . . . demanding millions of dollars in additional premiums." App. 38-39. The District Court acknowledged the tolling agreement, but observed that PFI filed its counterclaims on October 10, 1995, which was after the agreement's October 22, 1994 deadline. *Id.*

The court rejected PFI's argument that Hartford's filing of a complaint within the time limit set forth in the tolling agreement tolled the statute of limitations for compulsory counterclaims. App. 39-40. The court conceded that "tolling may be the majority approach," but held that the District of Columbia had rejected this approach in *Sears, Roebuck & Co. v. Goudie*, 290 A.2d 826, 830 (D.C. 1972). The court rejected PFI's reliance on *De Vito v. Hoffman*, 199 F.2d 468 (D.C. Cir. 1952), which follows the majority rule, on the grounds that *De Vito* "predates *Goudie* by 20 years and is not controlling here." App. 39 n.12. Consequently, the court concluded, the counterclaims were time-barred, App. 40; they had not been filed in the two-day period between Hartford's complaint and the expiration of the tolling agreement.

## VII. THE COURT OF APPEALS' RULING

Hartford appealed and PFI cross-appealed. The Court of Appeals consolidated the appeals, affirmed the dismissal of the counterclaims, reversed the grant of summary judgment for PFI, and remanded with instructions to enter summary judgment for Hartford. App. 16, 18.

The Court of Appeals concluded that the Policy unambiguously permitted a retroactive premium increase, App. 8-9, even though Hartford admitted that "no issue

. . . relating to the premium calculation" for the Policy "was or could have been presented" in *Anderson*, Hartford Br. at 16, and even though the District Court, ***which also found the Policy unambiguous***, reached exactly the opposite result, App. 33. The Court of Appeals also held that Hartford was not required to issue an endorsement to effect such a retroactive premium increase despite the fact that the Policy expressly required an endorsement to change the Policy's terms. App. 13-16. If Hartford had issued such an endorsement, PFI could have declined to renew the Policy and, instead, self-insured at a lower cost.

The Court of Appeals affirmed the dismissal of PFI's compulsory counterclaims as time-barred, holding that the District of Columbia no longer follows the majority rule on tolling. App. 17-18. The Court of Appeals did so even though it conceded that there is "considerable law (and sensible policy) on PFI's side." App. 17.

## REASONS FOR GRANTING THE WRIT

This case presents important issues of civil procedure and insurance law. By purchasing workers' compensation insurance from Hartford, PFI shifted to Hartford the risk of loss for workers' compensation claims. In return, PFI paid a premium that the parties agreed would be calculated at Virginia premium rates. The bargain was an excellent one for Hartford. To date, PFI has paid $1.7 million in premiums and Hartford has paid out only $1.4 million in benefits. Yet now, long after the policy period has ended, Hartford seeks to rewrite the contract to allow it retroactively to charge District of Columbia premium rates, which are substantially higher than Virginia rates, to obtain $5.3 million in additional premiums.

The Court of Appeals ordered the District Court to grant summary judgment for Hartford, concluding that

the Policy unambiguously permitted a retroactive premium increase in light of *Anderson*. In reaching this result, the Court of Appeals adopted constructions of the Policy that it deemed "plausible," even though it conceded that, in order to justify summary judgment, its reading of the Policy had to be "the only reasonable construction of [the Policy's] terms." App. 14 & n.3. By applying the more easily satisfied "plausibility" standard, the court improperly relieved Hartford of its burden, as the party seeking summary judgment, of showing that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law. Only by relieving Hartford of this burden could the Court of Appeals order summary judgment for Hartford. Indeed, the Court of Appeals reached this result even though Hartford admitted that "no issue . . . relating to the premium calculation" for the Policy "was or could have been presented" in the case on which the Court of Appeals relied to justify its decision, Hartford Br. at 16, and even though the District Court, which also found the Policy unambiguous, reached exactly the opposite result. In so holding, the Court of Appeals ignored the requirements of Fed. R. Civ. P. 56 and the parties' agreement to charge Virginia premium rates, and effectively enabled Hartford to shift the risk of loss back to PFI, contrary to core principles of insurance law.

The Court of Appeals further erred (both as a matter of civil procedure and as a matter of insurance law) in holding that Hartford was not required to issue an endorsement to effect such a retroactive premium increase. The Policy expressly required an endorsement to change the Policy's terms, and Hartford's failure to issue one worked a significant hardship on PFI because, if Hartford had issued such an endorsement, PFI could have declined to renew the Policy and, instead, self-insured.

Finally, the Court of Appeals erred in affirming the dismissal of PFI's compulsory counterclaims as time-barred. When Hartford filed its complaint just before the statute of limitations expired, PFI moved to dismiss, as permitted by Fed. R. Civ. P. 12. When PFI's motion was denied, PFI answered and counterclaimed within the time limits specified in Fed. R. Civ. P. 12(a)(4)(A). The Court of Appeals conceded that there is "considerable law (and sensible policy) on PFI's side," App. 17, but still affirmed the dismissal of the counterclaims, holding that the filing of Hartford's complaint did not toll the statute of limitations. This result is contrary to the policies underlying the Federal Rules of Civil Procedure. Unless compulsory counterclaims relate back to the filing of the complaint, a plaintiff can wait until just before the statute of limitations runs to file the complaint and thus deprive the defendant of the right to file a counterclaim.

The Court of Appeals' decision conflicts with decisions of this Court and other courts of appeals, and "so far depart[s] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a). Further, because the policy at issue is "a type common for workers' compensation," App. 2, the Court of Appeals' decision has ramifications far beyond the present case. For all of these reasons, this Court should grant the Petition.

## I. THE COURT OF APPEALS ERRED IN ORDERING SUMMARY JUDGMENT FOR HARTFORD

### A. The Court Of Appeals Erred In Holding, On Summary Judgment, That The Policy Unambiguously Permitted A Retroactive Premium Increase Based On *Anderson*

This case concerns fundamental principles of federal civil procedure and insurance law. "The payment of the premium by the insured and the assumption of a specified risk by the insurer are the essential elements of the contract of insurance." 5 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* § 69:2, at 69-7 to 69-8 (1996) ("*Couch*"). Here, by issuing the Policy, Hartford "agree[d] to assume the risk of the insured's liability" in return for Virginia premiums. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1041 (D.C. Cir. 1981). The promise to charge Virginia premiums, of course, was an essential element of the Policy. *See* 44 C.J.S. *Insurance* § 261 (1993) (essential elements of insurance contract include agreement on amount of premium); 43 Am. Jur. 2d *Insurance* § 187 (1982) (same). By permitting Hartford to charge District of Columbia premium rates retroactively based on *Anderson*, the Court of Appeals, in essence, made PFI the insurer and Hartford the insured, for under the Court of Appeals' reading of the Policy, PFI insured Hartford against the risk of an adverse decision in *Anderson* -- a result that stands the Policy on its head.

When the meaning of an insurance policy is at issue, summary judgment is appropriate where the policy admits of only one reasonable interpretation.[7] If the Policy is

[7] *Hughes v. Boston Mut. Life Ins. Co.*, 26 F.3d 264, 269 (1st Cir. 1994)

(Footnote continued)

susceptible to more than one reasonable interpretation, then it is ambiguous, a question of fact is raised, and summary judgment for the insurer is improper. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (summary judgment is appropriate only where "there can be but one reasonable conclusion as to the verdict").

The party seeking summary judgment must, of course, meet the burden of demonstrating the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). Moreover, it is well-recognized that "in a summary judgment proceeding the party against whom the burden of proof falls at trial faces a challenge more difficult than otherwise." *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1425 (11th Cir. 1990) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).[8] Thus, Hartford, as the plaintiff, bore a substantial burden of demonstrating that its interpretation of the Policy was the only reasonable one.

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(Footnote continued)

(summary judgment vacated where insurer's interpretation of policy "is not the only plausible one"); *Fireman's Fund Ins. Co. v. Murchison*, 937 F.2d 204, 208 (5th Cir. 1991) (summary judgment reversed where agreement "is subject to two reasonable interpretations"); *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 10 (2d Cir. 1983) (summary judgment reversed because insurance contract "is not wholly unambiguous").

[8] *See National State Bank v. Federal Reserve Bank*, 979 F.2d 1579, 1582 (3d Cir. 1992) ("Where the party moving for summary judgment is the plaintiff, . . . the standard is more stringent."); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) ("[I]f the movant bears the burden of proof on an issue, . . . he must establish beyond peradventure *all* of the essential elements of the claim . . . to warrant judgment in his favor.").

The Court of Appeals, however, improperly lessened Hartford's burden. For example, the court admitted that its interpretation of the Policy rendered one of the Policy's clauses "partially redundant," but defended the interpretation as a "plausible" one. App. 11. Similarly, the Court of Appeals criticized PFI for failing to offer any explanation of why the endorsement requirement of the Policy did not apply to retroactive premium increases. App. 14. The court conceded that it "d[id] not feel qualified to embrace" Hartford's competing explanation, but nonetheless deemed it "a plausible one." *Id.*

The standard on summary judgment, however, is not whether a particular construction of the contract is "a plausible one," but whether it is "the only plausible one." *Hughes v. Boston Mut. Life Ins. Co.*, 26 F.3d 264, 269 (1st Cir. 1994); *see* cases cited *supra* pp. 15-16 n.7. Although the Court of Appeals claimed to be "test[ing] whether our own reading of the contract is indeed the only reasonable construction of its terms," App. 14 n.3, by adopting interpretations that were merely "plausible," the court improperly disregarded the very standard it claimed to be applying.

Moreover, by ordering summary judgment for Hartford based on "plausible" readings of the Policy, the Court of Appeals improperly imposed on Hartford a less strenuous burden than other circuits impose on plaintiffs seeking summary judgment. *See* cases cited *supra* p. 16 n.8. The Court of Appeals compounded its error by, in essence, placing the burden on PFI to disprove Hartford's interpretation of the Policy.[9]

[9]*See* App. 12 ("[A]s Hartford rightly points out, PFI's restrictive reading would illogically bind the insurer to the insured's declaration of address despite misrepresentation, a simple out-of-state move during

(Footnote continued)

To make matters worse, the Court of Appeals' construction of the Policy is not even a plausible one, much less the only reasonable one. The mere fact that a district judge with almost twenty years of experience on the federal bench read the Policy in a manner diametrically opposite from that of the Court of Appeals is evidence that the Court of Appeals' reading is not the only reasonable one. *See Stroehmann v. Mutual Life Ins. Co.*, 300 U.S. 435, 439 (1937); *Thomas v. Mutual Benefit Health & Acc. Ass'n*, 123 F. Supp. 167, 171 (S.D.N.Y. 1954) ("If Judges learned in the law can reach so diametrically conflicting conclusions as to what the language of the policy means, it is hard to see how it can be held as a matter of law that the language was so unambiguous that a layman would be bound by it."), *aff'd*, 220 F.2d 17 (2d Cir. 1955).[10] Here, PFI respectfully submits that the Court of Appeals' reading ignores the risk-shifting principle of insurance and thus is not a reasonable one, much less the only reasonable one.

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(Footnote continued)

the policy year, or an honest error. PFI offers no construction of the policy that applies the retroactive adjustment clause to any of those scenarios. Nor does it explain why the parties would limit the insurer to such alternative remedies as a fraud claim (which would encompass only some misrepresentation cases) or a rise in the mod (which would be prospective only)."); App. 14 ("PFI offers no rationale whatsoever for applying the . . . endorsement requirement to adjustments under the Final Premium Clause."); App. 16 (PFI "has shown no reason to think that it was harmed" by the failure to issue an endorsement).

[10] *Accord Walker v. Fireman's Fund Ins. Co.*, 268 F. Supp. 899, 901 (D. Mont. 1967); *Security Ins. Co. v. Investors Diversified Ltd.*, 407 So. 2d 314, 316 (Fla. Dist. Ct. App. 1981); *George H. Olmsted & Co. v. Metropolitan Life Ins. Co.*, 161 N.E. 276, 277-78 (Ohio 1928); *Jones v. Insurance Co. of N. Am.*, 504 P.2d 130, 133 (Or. 1972); *Alvis v. Mutual Benefit Health & Accident Ass'n*, 297 S.W.2d 643, 645-46 (Tenn. 1956).

In particular, the Court of Appeals' reading of the Final Premium Clause was not reasonable. That clause provides that the premium set forth in the Policy is "an estimate" and the final premium will be determined "by using the actual, not the estimated, [payroll] and the proper classification and rates that lawfully apply to the business and work covered by this policy." App. 20-21. The Court of Appeals held that the Final Premium Clause was unambiguous and that, once the District of Columbia Court of Appeals determined that Redskin players were permitted to receive benefits in the District of Columbia, "only the D.C. classifications and rates would qualify as the 'proper classification and rates that lawfully apply' to the affected employees." App. 8.

*Anderson* did ***not,*** however, hold that it was no longer "proper" to apply Virginia premium rates, and it certainly did not hold that it was no longer "lawful[]" to apply such rates. As the District Court recognized, *Anderson* was a decision about workers' compensation ***benefits***, App. 35-36; it says nothing whatsoever about the issue of ***premiums*** for workers' compensation insurance. Indeed, Hartford admits "the *Anderson* court did not order The Hartford to apply D.C. rates. . . . The Department of Employment Services has no jurisdiction over insurance and no issue was or could have been presented in the case relating to the premium calculation for the Redskins workers' compensation insurance policies." Hartford Br. at 16. This concession disposes of Hartford's case, for if *Anderson* did not order Hartford to charge District of Columbia rates, then Hartford was not "obligated by law," Complaint ¶ 16, to charge them.

The Court of Appeals nonetheless concluded that the determination in *Anderson* that all Redskin players were

eligible for District of Columbia benefits "entailed a matching change in the 'actual' rates." App. 9-10. The Court of Appeals reasoned that "[t]he logic of any insurance policy, prospective or retrospective, requires premium levels to track expected benefits." App. 8.

To be sure, in setting premiums *prospectively*, insurers seek to have them track benefits. In fact, the Policy contained an "experience modification factor," which allows for prospective adjustments of the premium based on the policyholder's loss experience, *see* App. 5, and Hartford used this factor to increase PFI's premiums during the policy period. App. 28. But if an insurer could calculate premiums *retroactively* to make them track benefits, it would never take any risk at all, because it could always retroactively increase its rates to cover any unexpected losses. Such a result would negate the essential purpose of insurance contracts, namely, the shifting of a risk from the policyholder to the insurer in return for a premium. *See Keene*, 667 F.2d at 1041; 5 *Couch* § 69:2, at 69-7 to 69-8.[11] Furthermore, even if the Court of Appeals were correct, a retroactive premium increase is unnecessary because, thus far, premiums have exceeded benefits by $300,000. Finally, again assuming that the Court of Appeals were correct, Virginia premium rates might still

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[11]The Court of Appeals admitted its reading of the Policy rendered "partially redundant the separate clause governing ordinary, nonjurisdictional, changes to work classifications." App. 11. The Court of Appeals' reading would also render the "experience modification factor" superfluous. Such interpretations violate the principle that a contract should be read "to give 'a reasonable, lawful, and effective meaning to all [the policy's] terms.'" App. 14 (quoting *1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc.*, 485 A.2d 199, 205 (D.C. 1984)); 2 *Couch* § 21:17, at 21-37.

apply because *Anderson* did not hold players ineligible for Virginia benefits.[12]

The Court of Appeals not only failed to give sufficient weight to the risk-shifting principle but also mistakenly construed the word "rates" in the Final Premium Clause to have a meaning different than it has in the Classifications Clause. The Classifications Clause states that the Policy "shows the rate and premium basis for certain business or work classifications. . . . If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement . . . ." App. 20.

The Classifications Clause addresses the situation where job classifications assigned to particular employees do not accurately represent the nature of the work they are performing (*e.g.*, where an employee classified as a clerical worker is actually playing football). If an employee has been misclassified, the Classifications Clause provides a mechanism for reclassifying him/her properly. Because premium rates vary for different job classifications, when employees are reclassified, the premium rates applicable to those employees will also change. Thus, the term "rates" in the Classifications Clause refers to the proper rate for a particular job classification. Indeed, the parties agree that the Classifications Clause does not address the question of which state's premium rates apply. App. 16 ("[PFI argues that] the Classifications Clause does not cover

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[12]In fact, because players can recover benefits wherever they are injured, a requirement that premiums track benefits retroactively could well mean that an insurer could retroactively increase premium rates depending on where players were injured. Moreover, if courts in different states reached inconsistent determinations as to where players were principally employed, an employer could face conflicting retroactive premium adjustments.

jurisdictional change, and Hartford agrees on that point."); Hartford Br. at 22.

If the term "rates" in the Classifications Clause refers to the rates for particular job classifications, and not the rates for a particular state, then it must have the same meaning in the Final Premium Clause. It is a fundamental rule of contract interpretation that "the same words used in different clauses will be understood to have been used in the same sense." 45 C.J.S. *Insurance* § 364, at 87 (1993).[13]

The Court of Appeals, however, held that the term "rates" in the Final Premium Clause had an "independent meaning" and that equating the use of this term with the term "rates" in the Classifications Clause "sacrifices the fundamental principles of the policy to symmetry -- and a false symmetry at that." App. 9-10. The "symmetry" advocated by PFI, however, is nothing more than a recognition of the black letter rule noted above. Nor does this "symmetry" sacrifice any "fundamental principles of the policy," App. 9, for as PFI has shown, the Final Premium Clause does not require premiums to track benefits retroactively in all circumstances.

Even assuming the term "rates" could have different meanings in the Classifications Clause and the Final Premium Clause, the Court of Appeals still erred when it equated, for purposes of the Final Premium Clause, a "change[] in actual work location" with the change resulting from *Anderson*. *Id.* The court stated that "PFI's restrictive reading would illogically bind the insurer to the

[13] *Accord Shuford Dev. Co. v. Chrysler Corp.*, 449 F.2d 429, 436 (5th Cir. 1971); *Hartford Accident & Indem. Co. v. Case Found. Co.*, 294 N.E.2d 7, 13 (Ill. App. Ct. 1973); 2 *Couch* § 22:42, at 22-90; 4 Samuel Williston, *Williston on Contracts* § 618, at 715-16 (3d ed. 1961).

insured's declaration of address despite misrepresentation, a simple out-of-state move during the policy year, or an honest error" and that "PFI offers no construction of the policy that applies the retroactive adjustment clause to any of those scenarios." App. 12. This statement erroneously assumes that PFI had the burden of offering such a construction in order to defeat summary judgment for Hartford. Assuming ***arguendo*** that PFI had such a burden and that the Final Premium Clause covers an out-of-state move or a misrepresentation, such contingencies, which are wholly within the control of the insured, are radically different from the contingency presented in this case, *i.e.*, a legal determination that Redskin players are entitled to benefits in the District of Columbia. This determination ultimately was beyond the control of either PFI or Hartford. If there is a fundamental principle underlying the Final Premium Clause, it is that Hartford can adjust the final premium for changes in circumstances within the control of PFI. As the Court of Appeals noted, retrospective rating is appropriate where "the insured's activities and the size of its payroll are likely to vary considerably over the course of the policy term." App. 4. For example, if the Redskins increase the payroll for the year, make a clerical worker a football player, or erroneously classify a football player as a driver, the Final Premium Clause would allow Hartford to adjust the final premium. Thus, assuming ***arguendo*** that the Final Premium Clause applies to voluntary changes in circumstances by the insured, it would cover an out-of-state move or a misrepresentation by the insured.

PFI could not, however, control the outcome of *Anderson* (especially in light of PFI's role as a nominal party and Hartford's responsibility for the litigation) or the determinations of other states that players are entitled to

benefits in those states. The Policy, even if read to allow retroactive adjustment for voluntary actions, should not be extended to cover involuntary contingencies. Such contingencies were among the risks shifted to Hartford when PFI purchased the Policy. Just as Hartford could not retroactively increase the premiums if far more claims were filed than expected -- a contingency not within PFI's control and addressed through the experience modification factor -- it cannot now seek to increase retroactively the premiums on the basis that a greater-than-expected level of benefits was required to be paid.

In sum, PFI respectfully submits that the Court of Appeals misconstrued the Final Premium Clause in holding that it unambiguously permitted Hartford to increase PFI's premium rates retroactively based on the *Anderson* decision. The Court of Appeals compounded its error by reaching this decision on summary judgment. For these reasons alone, this Court should grant the Petition.[14]

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[14]The cases the Court of Appeals cited as holding that "the retrospective rate-changing power encompasse[s] erroneous jurisdictional assignments," App. 12-13, are inapposite. Neither case addressed the issues raised by PFI. Rather, in both cases, the insurance policies were significantly different from PFI's Policy. In *D.A.X., Inc. v. Employers Insurance*, 659 N.E.2d 1150 (Ind. Ct. App. 1996), the policy expressly incorporated a rule adopted by the Indiana insurance regulators that provided a means for determining where truck drivers who worked in several states were employed. *See id.* at 1153. No similar rule exists here. Furthermore, *Continental Insurance Co. v. Seppala & Aho Construction Co.*, 430 A.2d 157 (N.H. 1981), is distinguishable because the policy in that case used different language than PFI's Policy. *See id.* at 158-59.

B. The Court Of Appeals Erred In Holding, On Summary Judgment, That Hartford Did Not Have To Issue An Endorsement To Increase Premiums Retroactively Based On *Anderson*

This Court should also grant the Petition because the Court of Appeals misinterpreted the Policy's endorsement requirement and literally read it out of existence. The Policy states, "The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy." App. 20. As noted above, Hartford issued an endorsement for the third policy year, but not for the first two policy years. The District Court held that Hartford's failure to issue an endorsement for the first two policy years retroactively increasing PFI's premiums provided an additional basis for granting summary judgment for PFI with respect to those two policy years. App. 33. The Court of Appeals reversed, explaining that a retroactive premium adjustment pursuant to the Final Premium Clause is not a "'change' of a term of the Policy: it is an *exercise* of a power that a specific policy term -- the Final Premium Clause -- expressly grants the insurer." App. 13-14.

PFI respectfully disagrees. The words of a contract should be construed according to their ordinary meaning, 2 *Couch* § 22:10, at 22-21, and it cannot be denied that a reasonable person would construe a retroactive premium increase of $5.3 million -- more than three times the $1.7 million in premiums that PFI has already paid -- as a "change" in a term of the insurance contract. To deny that the retroactive premium increase was a change in the Policy's terms is to deny PFI the notice of such a change to which it was entitled under the Policy and the opportunity

to find alternative means of insuring the risks it had shifted to Hartford.

Moreover, Hartford's own conduct demonstrates that it believed an endorsement was required for a retroactive increase in the premiums to reflect District of Columbia premium rates. Otherwise, Hartford would never have issued such an endorsement when the District of Columbia Court of Appeals decided *Anderson*. The parties' interpretation of a contract is given great weight in determining its meaning. *See, e.g., Dano Resource Recovery, Inc. v. District of Columbia*, 620 A.2d 1346, 1353 (D.C. 1993) (parties' conduct in performing contract is relevant to ascertaining their intent). Here, given Hartford's issuance of an endorsement, the Court of Appeals should not have decided, on summary judgment, that the Policy was unambiguous and did not require an endorsement to increase the premiums retroactively.

## II. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISMISSAL OF PFI'S COMPULSORY COUNTERCLAIMS AS TIME-BARRED

As discussed above, the Court of Appeals held PFI's compulsory counterclaims time-barred. In so doing, the court erred by effectively abrogating the time limits provided in the Federal Rules of Civil Procedure for filing such counterclaims. The timely filing of Hartford's complaint tolled the statute of limitations for the counterclaims. Accordingly, the Court of Appeals' decision on this point should be reversed, and the counterclaims should be remanded for trial.

As the District Court noted, "[i]n viewing a motion to dismiss, . . . [t]he factual allegations of the complaint must be presumed true and liberally construed in favor of

plaintiff [and] [t]he plaintiff is entitled to all favorable inferences which may be drawn from those allegations." App. 37. The Court of Appeals has acknowledged that "a motion to dismiss may be granted on the basis that the action is time-barred only when it appears from the face of the complaint that the relevant statute of limitations bars the action." *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1115 (D.C. Cir. 1985).

Here, PFI unquestionably filed its counterclaims within the time limits specified in the Federal Rules of Civil Procedure. The counterclaims relate back to the date of the timely filing of Hartford's complaint because of the well-recognized rule that the institution of a suit tolls the running of the statute of limitations governing compulsory counterclaims. *See De Vito v. Hoffman*, 199 F.2d 468, 469 (D.C. Cir. 1952). The Court of Appeals acknowledged that "there is considerable law (and sensible policy) on PFI's side," App. 17, but held that the District of Columbia follows the minority rule, as purportedly expressed in *Sears, Roebuck & Co. v. Goudie*, 290 A.2d 826 (D.C. 1972).

*Sears*, however, did not even cite *De Vito*, for *Sears* involved a different issue: whether portions of an amended counterclaim related back to earlier dismissed counterclaims. The *Sears* court held that, to the extent the amended counterclaim restated claims made in the original counterclaim, it did relate back. *Sears*, 290 A.2d at 831. To the extent that the amended counterclaim attempted to add new causes of action which were not asserted in the initial counterclaim, however, it did not relate back. *Id.* The court did not consider whether the filing of a complaint tolls the statute of limitations for the initial filing of compulsory counterclaims. Thus, the controlling

precedent is not *Sears*, but rather *De Vito*. *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

The approach reflected in *De Vito* and other cases that follow the majority rule "precludes plaintiff, when the claim and counterclaim are measured by the same period, from delaying the institution of the action until the statute has almost run on defendant's counterclaim so that it would be barred by the time defendant advanced it." 6 Charles Alan Wright et al., *Federal Practice and Procedure: Civil 2d* § 1419, at 152-53 (1990) ("Wright and Miller"). Applying *De Vito* here would enable the Court to implement the "sensible policy" recognized by the Court of Appeals and by Wright and Miller. By contrast, the approach advocated by Hartford and applied by the Court of Appeals would allow precisely the result that Wright and Miller warns about: a plaintiff could wait until just before the statute runs, file its complaint, and then prevent the defendant from filing any compulsory counterclaims on the ground that they are untimely.

Indeed, were Hartford correct, PFI would have had to forgo filing its motion to dismiss (a right expressly granted by Fed. R. Civ. P. 12) and bring its counterclaims in the less than two-day period between Thursday, October 20, 1994, when Hartford served the complaint on PFI's agent, and midnight Friday, October 21, because the statute ran on Saturday, October 22, when the courthouse was, of course, closed. Such a result is clearly at odds with the Federal Rules of Civil Procedure, which state that a party does not have to answer until the court rules upon any motion to dismiss and further contemplate that the counterclaim will be filed with any answer. *See* Fed. R. Civ. P. 12(a)(4)(A), 13(a). Moreover, if Hartford had waited until midnight on October 21 (which, as noted

above, was the day just before the statute ran), there literally would have been no time at all for PFI to file a compulsory counterclaim. Plainly, that cannot be the law. In addition, such a rule would be bad policy. It would force a party like PFI to initiate a claim it would rather forgo purely out of fear that a party like Hartford would wait until the eleventh hour to bring a lawsuit so as to preclude the filing of a timely counterclaim. Such a rule would thus spawn litigation rather than discourage it. Plainly, that cannot be the law either. Hartford's motion to dismiss on statute of limitations grounds should have been denied, and PFI respectfully submits that this Court should reverse on this issue and remand for a trial on the merits of PFI's counterclaims.

## CONCLUSION

For all the reasons set forth above, PFI respectfully requests that this Court grant the Petition and reverse the judgment of the Court of Appeals.

Respectfully submitted,

Barry Wm. Levine
Mark A. Packman
*Counsel of Record*
Jason D. Wallach
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, NW
Washington, DC 20037-1526
(202) 785-9700
*Counsel for Petitioner*